IN THE

Supreme Court of the United States

Term, 1949. 132-133

No. ~~879-880~~ 132-13

FLORENCE T. SMITH and JOHN M. SMITH, her husband; BENJAMIN D. FENIMORE; BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased; BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased, Trustee ad litem for Benjamin D. Fenimore and Elizabeth S. Fenimore, his wife, and FRANCIS A. SMITH,

Respondents,

vs.

PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner,

vs.

BENJAMIN D. FENIMORE,

Respondent.

ABIGAIL STERNER,

Respondent,

vs.

PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner,

vs.

BENJAMIN D. FENIMORE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HAROLD SCOTT BAILE,
2228 Land Title Bldg.,
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PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of Philadelphia Transportation Company, a corporation organized under the laws of the Commonwealth of Pennsylvania, respectfully represents:

This is a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review judgments affirming judgments of the United States District Court for the Eastern District of Pennsylvania.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

These actions arose out of a grade crossing collision in Pennsylvania between an automobile and an interurban trolley car of the petitioner, Philadelphia Transportation Company, hereinafter referred to as "P. T. C." The automobile was operated by Benjamin D. Fenimore and owned by Francis A. Smith. Riding in the automobile as passengers were Benjamin John Fenimore, the driver's minor son, Mrs. Florence T. Smith and Mrs. Abigail Sterner (118-119a).

On July 12, 1946, at about 1:20 in the afternoon, Fenimore was driving in a general westwardly direction from Philadelphia toward Chester on the Industrial Highway, which is divided by a grass island with two lanes of traffic in each direction (Pf. Ex. 10, 189a). Visibility was good and the surface of the highway dry (139a). A crossing is indicated by official highway signs posted on the north or right-hand side at distances of 224 feet and 98 feet from the tracks.

Before reaching the intersection Fenimore pulled out from the right-hand lane and assumed a position with his front wheels abreast of the rear wheels of a truck traveling in the same direction which remained in the right lane, and proceeded at 35 miles per hour in this way for about 1200 feet (120a). As they approached the crossing, the truck slowed down and came to a stop about 10 feet from the westbound tracks (66a, 70a). Fenimore did not slacken speed but passed the truck, cleared the westbound tracks and the dummy, and immediately upon entering the eastbound tracks collided with a P. T. C. trolley which was more than halfway across the 24-foot roadway and traveling 20 to 25 miles per hour. Fenimore admitted that he did not see the trolley until it was almost on top of him (121a). Fenimore had traveled approximately 45 feet beyond the truck, during which time he had a clear and unobstructed view along the tracks before the collision took place (Pf. Ex. 10, 189a).

As a result of the accident the Fenimore child was killed, the other occupants of the car were injured, and the car, itself, demolished. In two actions P. T. C. was sued by all of the occupants of the car and by the owner on the ground that the negligence of its motorman had caused the collision. Federal jurisdiction was based on diversity of citizenship (5a, 46a). In both actions P. T. C. joined the driver, Fenimore, as third party defendant on the ground that his negligence was either the sole or a joint cause of the accident (14a, 49a).

In response to specific questions propounded by the trial judge, the jury found the motorman negligent and exonerated Fenimore completely of any blame (181a). In denying P. T. C.'s motion for judgment for contribution from Fenimore, the trial judge, the Honorable T. Blake Kennedy of the District of Wyoming, specially presiding, said:

> "I am frank enough, really, to say that I think there is some question of doubt on that particular point as to whether or not there was contributory negligence as a

matter of law in the way that that car was being driven at the time of the crossing" (186a).

Judgments were entered against P. T. C. on the jury's verdicts totaling $96,800 (181-182a). These judgments were affirmed on appeal to the United States Court of Appeals for the Third Circuit. Judge Goodrich wrote the opinion of the court in which Judge McLaughlin concurred. On the question of Fenimore's negligence he said (196):

> "Certainly the finding that he was negligent would have been impregnable against attack. It is not so easy to support a finding that he was not negligent."

Judge Kalodner, in a separate opinion, concurred in part and dissented in part. He agreed that there was a basis for the finding that P. T. C. was negligent and, accordingly, the judgments in favor of the automobile passengers should be affirmed; but he went on to state (198):

> "In my opinion, however, the testimony clearly establishes that Fenimore was guilty of contributory negligence as a matter of law under the Pennsylvania decisions and accordingly the judgments entered in his favor, individually and in the two claims arising out of his minor son's death, should be set aside.
>
> "Since Fenimore was negligent, the P. T. C. as third-party plaintiff is entitled to a judgment against him for contribution toward the judgments obtained against it by the other plaintiffs above named. Fenimore's own testimony and that of his witness clearly establish his contributory negligence."

The single question we are asking this Court to review is the one upon which the Court Below divided; namely, whether Fenimore, the operator of the automobile, was guilty of contributory negligence as a matter of law under the decisions of the highest court of Pennsylvania. It is our position that the Court Below has denied the applica-

tion of the controlling rules in Pennsylvania as required by the decision of this Court in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1937).

STATEMENT OF BASIS UPON WHICH IT IS CONTENDED THE COURT HAS JURISDICTION.

The statute under which jurisdiction is involved is Section 1254 (1) of the Act of June 25, 1948, C. 646 (28 U. S. C. A., Section 1254).

The date of the mandate of the Court of Appeals for the Third Circuit is April 4, 1949. The date of the order of the Third Circuit denying P. T. C.'s petition for reargument is March 21, 1949.

The case involves an important question of local law which has been resolved by the Third Circuit in a way which is in conflict with applicable local decisions. The District Court ruled that the jury could find the driver of the automobile was not guilty of negligence. The Circuit Court affirmed the decisions of the District Court. This ruling is in conflict with the settled law of Pennsylvania.

QUESTIONS PRESENTED.

Where a motorist, traveling on a dual lane highway for the first time, passed to the left of a truck which was stopped at a clearly visible grade crossing to permit an interurban trolley to cross, and the automobile collided with the trolley the instant it reached the tracks,

(1) Did not the evidence, viewed in the light most favorable to the motorist, conclusively establish his negligence as a matter of law under applicable Pennsylvania decisions?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) The standard of conduct of a motorist approaching a grade crossing in Pennsylvania has been fixed by decisions of the Supreme Court of that state. See *Restatement, Torts,* Section 285, Pennsylvania Annotations; *Pieper v. Union Traction Co.*, 202 Pa. 100, 51 A. 739 (1902); *Keenan v. Union Traction Co.*, 202 Pa. 107, 51 A. 742 (1902). A motorist is duty bound to look and listen immediately before entering each set of tracks and to have his car under such control that he can stop if a trolley car is approaching: *Gallagher v. Phila. R. T. Co.*, 103 Pa. Superior Ct. 232, 157 A. 321 (1931); *Moore v. Erie Rys. Co.*, 308 Pa. 573, 162 A. 812 (1932); *Lessig v. Reading Transit & Light Co.*, 270 Pa. 299, 113 A. 381 (1921); *Moses v. Northwestern Pa. Ry. Co.*, 258 Pa. 537, 102 A. 166 (1917); *Patton v. George*, 284 Pa. 342, 131 A. 245 (1925); *Ferencz v. Pittsburgh Railways Co.*, 341 Pa. 369, 19 A. 2d 385 (1941); *Weldon v. Pittsburgh Rwys. Co.*, 352 Pa. 103, 41 A. 2d 856 (1945). Where a motorist is struck immediately upon reaching the tracks, it will be conclusively presumed that he failed to perform his duty: *Ehrhart v. York Rys. Co.*, 308 Pa. 566, 162 A. 810 (1932); *Leaman Transp. Corp. v. P. T. C.*, 358 Pa. 625, 57 A. 2d 889 (1948). These rules have been stated by the highest court of the state to be "inflexible" and "an unbending rule to be observed at all times, and under all circumstances": *Ehrisman v. East Harrisburg City Pass. Ry. Co.*, 150 Pa. 180, 24 A. 596 (1892).

The opinion of the Circuit Court recognized that the motorist in this case failed to conform to the standard required by these rules, but refused to rule that he was guilty of negligence as a matter of law, excusing his conduct under the "special circumstances of the case." The Court Below thus denied the application of controlling Pennsylvania law

and established a standard of care according to its own concept in contradiction of the rules applicable in the Pennsylvania courts. It is our position that this is a departure from the mandate of this Court in *Erie R. Co. v. Tompkins*, supra, and invites the resurrection of the main mischief sought to be cured by that decision. The Court of Appeals has given lip service to the decision of this Court and at the same time has ignored the applicable and controlling decisions of the highest courts of Pennsylvania.

The rules controlling the standard of conduct of motorists at grade crossings are firmly embedded in the Pennsylvania law of negligence. The decision of the Court of Appeals establishes a different standard where the case is tried in the Federal Courts. As was said by Chief Justice Hughes in *Fidelity Trust Co. v. Field*, 311 U. S. 169, 179 (1940), "it is inadmissible that there should be one rule of state law for litigants in state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship." In *Conway v. O'Brien*, 312 U. S. 492 (1940), this Court granted a certiorari where the Circuit Court of Appeals for the Second Circuit had erroneously interpreted the decisions of the highest court of Vermont in a tort case where the law of that state was controlling. The Circuit Court of Appeals for the Third Circuit has committed the same error in this case.

(2) The "special circumstances" which the Court Below held excused the motorist from conforming to the standard of care established by the Pennsylvania decisions were the facts that he was unaware of the crossing and that he had no reason to know of its existence. These excuses are unknown in the law of Pennsylvania. Where the presence of a railway crossing should be obvious to anyone reasonably using his ordinary powers of observation, a motorist will not be relieved of the duty imposed by law by reason of his ignorance of such crossing. This principle has been applied by the Pennsylvania courts in cases in which

the contention was made that automobile drivers were not to be held accountable for compliance with the rule of "stop, look and listen" at railroad crossings where they asserted they were ignorant of its existence by virtue of their unfamiliarity with the highway or by reason of darkness. In such cases the Pennsylvania Supreme Court has uniformly held that those using a highway at night, or being unfamiliar therewith, must inform themselves of possible dangers that may lie in their path of travel and not proceed blindly ahead: *Anspach v. Phila. & Reading Ry. Co.*, 225 Pa. 528, 74 A. 373 (1909); *Serfas v. Lehigh & New Eng. R. R. Co.*, 270 Pa. 306, 113 A. 370 (1921); *Kelly v. Director Gen. of R. R.*, 274 Pa. 470, 118 A. 436 (1922); *Eline v. Western Maryland Ry. Co.*, 262 Pa. 33, 104 A. 857 (1918). In *McCann v. P. R. R. Co.*, 119 Pa. Superior Ct. 205, 208, 180 A. 750 (1935), the plaintiff, driving on an unfamiliar highway at night, failed to see the tracks of a crossing until he was upon them. In denying a recovery for injuries received as a result of being struck by a train, the court said:

> "The failure of plaintiff to observe the grade crossing clearly indicated that he did not look where he was driving in which event he was guilty of contributory negligence: * * *"

The Court of Appeals refused to apply this firmly established rule, and in doing so, misinterpreted the decision of the Supreme Court of Pennsylvania in the case of *Kindt v. Reading Co.*, 352 Pa. 419, 43 A. 2d 145 (1945). In that case the only issue was whether plaintiff had produced positive evidence that the train had failed to sound a warning signal. There was no question of contributory negligence and no contention by the defendant railroad that the crossing could or should have been seen. Railroad's counsel in that case clearly stated in his brief: "Both at the trial and later in the argument in the court below, no imputation of contributory negligence was made against the plaintiffs." Thus, that case has no application to the ques-

tion of whether Fenimore was guilty of contributory negligence as a matter of law; and that is the case cited by the Court of Appeals as authority for excusing Fenimore's nonconformance with the standard of care required under the circumstances.

Exhibits in the form of photographs taken on the day of the accident and *introduced by plaintiffs* show that the rails of the crossing could be seen from over 200 feet; that the overhead trolley wires crossed the highway; that the trolley tracks were adjacent to the highway on the left for almost half a mile before the crossing and plainly visible to traffic on the left lane; and that the highway curved to the left near the scene of the accident and crossed the tracks.

The existence of these physical facts is indisputably shown by the *photographs introduced by plaintiffs. The photographs were taken on the day of the accident.* Plaintiffs' witness the truck driver, testified that "they accurately show the conditions of visibility and what you could see at the time of the accident" (74a). The opinion of the Court Below overrides these indisputable physical facts established in the plaintiffs' own case, saying that it did not think the tracks were "equally clear to a driver of a car working his way along the highway."

The Court of Appeals considered the case of *Rea v. Pittsburgh Rys. Co.*, 146 Pa. Superior Ct. 251, 255, 22 A. 2d 68 (1941), as authority for finding "special circumstances" to excuse Fenimore's conduct. In that case the collision between an automobile and a trolley car occurred in the center of the business district of Pittsburgh where several main arteries converge at one intersection. There was an elaborate system of traffic lights. The driver of the car, who had stopped for a red light, proceeded to enter the intersection when the light turned green. On his left were two lanes of traffic moving in the same direction. A trolley came through the red light and crashed into him. His vision was obscured by the cars to his left. In holding he was not guilty of contributory negligence as a matter of law, the court stated:

> "* * * He had relied upon the invitation of the traffic signals and from necessity, to some extent upon the movement of automobiles to his left and to the judgment of those drivers who were in a position to see."

This ruling, if anything, supports our contention that Fenimore should have been guided by the action of the truck. Had he done so, no accident would have occurred. Furthermore, the court's opinion was based entirely upon the fact that the driver had the right to assume that the trolley car would comply with the traffic signal. Fenimore had no such right since there were no traffic signals at this crossing. That case, therefore, is clearly not authority for excusing Fenimore's nonconformance with the settled Pennsylvania rules.

CONCLUSION.

The standards of care which have been established by the Pennsylvania Supreme Court concerning motorists driving onto grade crossings are an expression of the settled public policy of the state. It is a policy dictated by the belief that accidents can be prevented by requiring motorists to exercise a higher degree of care and to defer to the right of way of trolley cars. This record reveals affirmatively that Fenimore did not conform to the required standard. Under such circumstances it seems only proper that his insurance carrier should be required to assume his share of the damages. That would have been the result had the case been tried and determined in the state courts. We, therefore, ask this Court to grant a writ of certiorari in order that the decision in this case will conform to the

law of Pennsylvania and the loss sustained will be shared equally by those responsible.

Respectfully submitted,

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